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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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DANIEL KANNEGAARD,)
Plaintiff,) No. CV-04-156-CI
v.) ORDER GRANTING DEFENDANTS'
WASHINGTON STATE UNIVERSITY,) MOTION AND DISMISSING
GREG ROYER, CHRIS KENNEY, ERIK) PLAINTIFF'S COMPLAINT AND
WEBB, and YVES LATOUCH,) CLAIMS WITHOUT PREJUDICE
Defendant.)

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BEFORE THE COURT is Defendants' Motion for Summary Judgment dismissal filed February 23, 2005, and noted for hearing without oral argument on March 31, 2005. (Ct. Rec. 11.) Plaintiff is appearing pro se; Assistant Attorney General Aaron V. Rocke represents Defendants. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) Plaintiff has not responded to the instant Motion; accordingly, pursuant to LR 56.1(d), Local Rules for the Eastern District of Washington, it is assumed that factual matters not controverted are admitted to exist without controversy.

On May 10, 2004, Plaintiff filed a Complaint against Defendants, alleging damages as a result of the termination of his employment from Washington State University (WSU) on or about May 10, 2001. Plaintiff alleges his termination violated provisions of

1 42 U.S.C. § 1983, and the Washington State Whistle Blower Act, RCW
2 42.40. Defendants include Washington State University, Greg Royer,
3 Chris Kenney, Erik Webb, Tim McCarty,¹ and Yves LaTouch.

4 Plaintiff asserts he was employed by WSU from June 1995 through
5 May 10, 2001. On or about November 4, 2000, Plaintiff filed a
6 complaint with the Washington State Auditor's office under RCW
7 42.40, reporting that Defendant Yves LaTouch, an employee of WSU's
8 food service, had taken products from the food service for his
9 personal use. Following an investigation, Plaintiff asserts the
10 State Auditor concluded there were ethical violations. Nonetheless,
11 Plaintiff contends Defendants Kenney, McCarty, Webb, and LaTouch,
12 members of the WSU management team who supervised Plaintiff,
13 retaliated against him by defaming him, failing to promote him,
14 harassing him on the job site, culminating in Plaintiff's
15 termination effective May 10, 2001. Plaintiff also contends
16 Defendant Greg Royer, WSU Vice President of Business Affairs, was
17 aware of the retaliation, but took no corrective action and
18 ultimately permitted Plaintiff's termination from public employment
19 without due process. Plaintiff seeks compensatory and exemplary
20 damages, costs and attorney fees.

21 Defendants move to dismiss the Complaint and claims on
22 procedural and substantive grounds. Defendants contend they have
23 not been properly served, the state and its universities enjoy

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25 ¹Although not named in the caption, Plaintiff refers to Tim
26 McCarty as a Defendant in ¶ 3.5 of the Complaint. (Ct. Rec. 1.)
27 For purposes of this Order, Mr. McCarty is considered an unserved
28 Defendant.

1 sovereign immunity from suit, and, if the federal claim is
2 dismissed, this court will lack jurisdiction over the pendent state
3 claim.

4 Defendants deny service of process. (Ct. Rec. 3 at ¶ 6.9.)
5 They further contend the Complaint fails to state an amount in
6 controversy. Moreover, because the Complaint was filed May 10,
7 2004, Defendants contend the only timely allegation covered by the
8 Complaint involves Plaintiff's termination on May 10, 2001. All
9 other claims involving acts prior to that date under either section
10 1983 or the Whistle Blower statute, it is argued, would be barred by
11 the state's three-year statute of limitations. RCW 42.40.050(1),
12 4.16.080(2).

13 Plaintiff appealed his termination from employment to the
14 Personnel Appeals Board, but the appeal was denied. (Ct. Rec. 14,
15 Rocke Decl., Ex. 3, Findings of Fact, Conclusions of Law and Order
16 of the Board at 13.) The decision was appealed to Thurston County
17 Superior Court; following remand by that court, the Personnel
18 Appeals Board amended its conclusion and found the more appropriate
19 sanction to be a suspension of Plaintiff's employment from May 11,
20 2001, through July 29, 2002. (Ct. Rec. 14, Rocke Decl., Ex. 5.) No
21 further appeal was taken by Plaintiff and Plaintiff then returned to
22 his work at WSU.

23 Plaintiff also contacted the Washington State Human Rights
24 Commission, who concluded in November 2002 there was no reasonable
25 cause Plaintiff was subjected to retaliation for having filed a
26 whistle blower complaint. (Ct. Rec. 14, Rocke Decl., Ex. 7.)

27 **PERSONAL JURISDICTION**

28 Defendants assert they were not personally served with the
ORDER GRANTING DEFENDANTS' MOTION AND DISMISSING PLAINTIFF'S
COMPLAINT AND CLAIMS WITHOUT PREJUDICE - 3

1 Complaint filed on May 10, 2004; there is no admissible evidence to
2 the contrary. The defense has not been waived; deficiency of
3 personal service was raised in the Answer filed June 28, 2004, and
4 Joint Report on Scheduling and Discovery Conference filed October
5 12, 2004. (Ct. Rec. 3, 5.) Once the defendant has challenged the
6 exercise of personal jurisdiction, the plaintiff bears the burden of
7 showing the court has jurisdiction. *KVOS, Inc. v. Associated Press*,
8 1936, 299 U.S. 269, 278 (1936).

9 FED. R. CIV. P. 4(c) requires personal service of the Summons and
10 Complaint. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788
11 F.2d 535, 538 (9th Cir. 1986) (stating a federal court obtains
12 personal jurisdiction over defendants who are served with process);
13 *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). "Rule 4
14 is a flexible rule that should be liberally construed so long as a
15 party receives sufficient notice of the complaint." *United Food &*
16 *Commercial Workers Union, Locals 197, 373, 428, 588, 775, 839, 870,*
17 *1119, 1179, and 1532 v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th
18 Cir. 1984). However, there must be "substantial compliance with
19 Rule 4." *Jackson*, 682 F.2d at 1347. A general appearance or
20 responsive pleading by a defendant that fails to dispute personal
21 jurisdiction will waive any defect in service or personal
22 jurisdiction. *Id.*; FED. R. CIV. P. 12(h)(1).

23 Rule 4(d) provides a summons and complaint may be served by
24 mailing a copy of the summons and of the complaint to the person to
25 be served, and requesting that the defendant waive service of a
26 summons. That request shall be in writing utilizing text prescribed
27 in an official form promulgated pursuant to Rule 84. FED. R. CIV. P.
28 4(d)(2). If no acknowledgment is received by the sender within at

1 least 30 days after the date of mailing, service of such summons and
2 complaint shall be made under the provisions for personal or
3 substituted service under Rule 4(c).

4 Pursuant to FED. R. CIV. P. 4(m), Plaintiff has 120 days from
5 filing to personally serve Defendants with the Summons and
6 Complaint. It has been more than 120 days since the Complaint was
7 filed on May 10, 2004. There has been no showing of good cause for
8 Plaintiff's failure to execute proper service. FED. R. CIV. P. 4(m).
9 Thus, this court is without jurisdiction to address further the
10 claims and defenses of this action. *Oyama v. Sheehan* (*In re
Sheehan*), 253 F.3d 507, 512 (9th Cir. 2001). Accordingly,

12 **IT IS ORDERED:**

13 1. Defendants' Motion (**Ct. Rec. 11**) is **GRANTED**; Plaintiff's
14 Complaint and claims are **DISMISSED WITHOUT PREJUDICE**.

15 2. The District Court Executive is directed to enter this
16 Order and furnish copies to Plaintiff by regular mail and counsel
17 for Defendants by electronic filing. Judgment shall be entered for
18 Defendants, each party shall bear its own costs, and the file shall
19 be **CLOSED**.

20 DATED April 20, 2005.

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S/ CYNTHIA IMBROGNO
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UNITED STATES MAGISTRATE JUDGE
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